BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANA STEVENSON	)	
Claimant	)	
	)	
VS.	)	
	)	
KEY STAFFING	)	
Respondent	)	Docket No. 1,040,697
	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the November 25, 2008 preliminary hearing Order entered by Administrative Law Judge Brad E. Avery.

ISSUES

The Administrative Law Judge (ALJ) found that the claimant suffered an accidental injury arising out of and in the course of her employment on June 4, 2008.[1] He went on to grant claimant's request for medical treatment with Dr. Bonar, the physician originally designated by respondent to provide treatment.

The respondent requests review of this Order and alleges a number of errors. First, respondent maintains the ALJ erred in finding that claimant sustained personal injury by accident on June 4, 2008 and that such accident arose out of and in the course of her employment with this respondent. Respondent also challenges timely notice of claimant's

[1] The ALJ's Order also includes the statement "[c]laimant continues to aggravate foot in her current duties requiring her to stand 6-7 hours a day." While that is true, that seems to be an irrelevant fact. Claimant is now employed by another employer and has not filed any claim against that employer. Respondent does not argue that there is any sort of intervening accident.

alleged accident and finally, alleges the ALJ exceeded his jurisdiction in granting claimant medical treatment. Respondent asks the Board to reverse the ALJ's Order.

Claimant contends the ALJ's Order is supported by the facts contained within the record and that it should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein[2], the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was assigned by respondent to work at the Goodyear plant beginning in March 2007. Her job was sedentary in nature but required her to wear steel toed shoes and to walk around to as many as 12 bulletin boards contained within the plant, which has a concrete floor, and post notices. Her work station was on the second floor and in order to take a restroom break, purchase a snack or walk for her job duties, claimant was required to use the stairs. Out of a 40 hour work week, claimant initially maintained that she would have to walk 1-2 hours throughout the plant. Later in her testimony she indicated that as much as 25 percent of her work week would be spent walking with the balance being spent at a desk doing data entry.

In February 2008 claimant began to notice problems with pain in her foot, left worse than her right. At one point claimant thought her pain was due to the heavy shoes she was required to wear so she purchased gel inserts. But she also recalls certain isolated events where she would trip on a pallet or twist an ankle. After each of these events she would experience pain and attempt to limit her walking, but she always felt that it would resolve.

Then on May 27, 2008, she woke to go to work and could not put weight on her foot. She contacted Tony Harbor, the site manager and Mike Scott, her supervisor, and informed them of her problem, asking for medical treatment.[3] Mike Scott helped her fill out the appropriate paperwork and claimant was sent for medical treatment at a local clinic. According to Tony Harbor, the plant supervisor, claimant's job activities were almost exclusively sedentary. And any assertion that claimant has that she tripped on pallets in walkways would be false as pallets are *never* allowed to accumulate in the walkways near the bulletin boards.

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[2] Although respondent repeatedly refers to claimant's discovery deposition , that deposition was not offered into evidence and is not contained within the file. Thus, it was not considered. And although respondent references Mike Scott's "deposition", there is no such deposition within the file. It seems more likely that respondent's references are to Mr. Scott's testimony at the preliminary hearing. Thus, only his testimony at the hearing has been considered.

[3] P.H. Trans. at 25.

Claimant was then referred to Dr. Sheryll Elder a foot podiatrist in June 2008. By this time (June 5, 2008) claimant had been terminated from her assignment at Goodyear. Dr. Elder examined claimant and noted a history of pain "for the past several months."[4] Dr. Elder also noted claimant's exaggerated pain complaints. She diagnosed Achilles tendonitis and plantar fasciitis on the left foot and offered claimant conservative treatment recommendations which included supportive shoes and ice. Although Dr. Elder's records indicates that claimant did not keep her follow-up appointments, claimant says that she was not allowed to return until her employer arranged for further appointments, something that was not done. She just continued to ice her foot and waited for further direction from respondent.

Respondent then referred claimant to Dr. Susan Bonar who examined claimant on August 6, 2008. Dr. Bonar also diagnosed left Achilles tendonitis and plantar fasciitis, indicating that claimant had been complaining of these symptoms for approximately one year. Dr. Bonar made treatment recommendations but offered no opinion as to the cause of claimant's complaints, although there is a clear reference in her office note of claimant's complaints of pain while walking and climbing stairs on concrete.

On August 9, 2008, Dr. Bonar issued a follow-up report. It contains the following notation:

> **ADDENDUM**: Further information was brought to my attention on the patient Dana Stevenson after her office visit of 08/06/2008. It was explained that she really was only doing about 2 hours a week walking on her job and 38 hours a week sitting on the job in data entry, when she developed the Achilles tendonitis. Even just having to be on the feet one or two days a week would not be enough to attribute Achilles tendonitis to the job if she had a sit down job at least three days of the week.
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> Overall, Achilles tendonitis, nodular or insertional, is a very common problem in the general population, just like plantar fasciitis. I would not attribute the origin of her tendonitis to the work situation with that limited amount of time on her feet on the job.[5]

At her lawyer's request, claimant was then seen by Dr. Edward Prostic on September 12, 2008. He examined claimant and like the other physicians, diagnosed the same condition. Dr. Prostic noted claimant's increasing complaints of pain which claimant attributed to repetitious climbing of the stairs, and walking in steel toed shoes on hard surfaces. He recommended that claimant have the treatment outlined by Dr. Bonar. His supplemental report, dated November 7, 2008, indicates that while the medical community does not know the precise cause of plantar fasciitis and Achilles tendonitis, he does say

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[4] *Id.*, Resp. Ex. B (Dr. Elder's Office note dated 06/05/08).

[5] *Id.*, Resp. Ex. A at 1.

"with certainty" that "this condition is easily worsened by progressive standing on hard surfaces, stair-climbing, and other forceful uses of the lower extremities."[6] He goes on to conclude that claimant's condition was aggravated by the work-related activities claimant reported to him.[7]

The ALJ found that claimant had established that a work-related accident occurred on June 4, 2008. And while respondent seems to take issue with this date, it appears that the ALJ was merely making a finding that claimant's last date of work was the last date she was exposed to the offending activities which led to her present condition. At one point in the hearing claimant referenced June 4, 2008 as her last day at Goodyear. But the greater weight of the evidence is that June 3, 2008 was the actual date claimant last worked for respondent at the Goodyear plant. In any event, this discrepancy is irrelevant for the reasons that follow.

Unfortunately, neither the ALJ or the parties considered the implications of K.S.A. 44-508(d), a statute that dictates the methodology for determining the date of accident. K.S.A. 44-508(d) was amended by the Kansas legislature effective July 1, 2005. The definition of accident has been modified, with the date of accident in microtrauma cases being now defined by statute rather than by case law. The new date of accident determination is as follows:

> (d) 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. **In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the**

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[6] *Id.*, Cl. Ex. 1 at 4 (Dr. Prostic's Nov. 7, 2008 report).

[7] *Id.*

> **day before the regular hearing.** Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[8] (Emphasis added.)

In this instance, claimant alleges a series of injuries to her foot, punctuated by some isolated events over the entire course of her employment with respondent. Towards the end of her tenure at this job, she notified her employer about her problems. Respondent referred claimant to Tallgrass Orthopaedics on May 27, 2008 where she was given a release to return to work, but with restrictions to walk and stand only as tolerated and to perform only seated duties. Based upon the statutory criteria, May 27, 2008 is claimant's legal date of accident. The ALJ's preliminary hearing Order is therefore modified to reflect May 27, 2008 as the date of accident.

This is also the date she informed respondent of her foot problems (which in turn caused respondent to refer her for medical care and for that reason, respondent's complaints with regard to lack of timely notice is unpersuasive. Respondent was given notice on the same day of claimant's accident. The statutory requisites of K.S.A. 44-520 have been met.

Turning now to the balance of respondent's arguments, principally the causal connection between claimant's work activities and her diagnosis, this Board Member finds the ALJ's factual and legal conclusions should be affirmed.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[9] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[10]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of"

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[8] K.S.A. 2005 Supp. 44-508(d).

[9] K.S.A. 2007 Supp. 44-501(a).

[10] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

> employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[11]

Respondent argues (based upon Dr. Bonar's report), that claimant's plantar fasciitis and Achilles tendonitis is not related to her work activities. Thus, respondent contends that her condition could not have arisen out of or in the course of her employment with respondent. Respondent also makes numerous references as to claimant's lack of consistency when describing the mechanism or the timing of her complaints. In addition, respondent argues that walking is an activity of day-to-day living and is specifically exempted by the Act as a compensable event.[12]

After considering the entirety of the evidence contained within the record, this Board Member finds the ALJ's Order on these issues should be affirmed. While it is true that claimant's testimony is somewhat less than consistent about the onset of her symptoms and whether she sustained any individual, acute accident, when considered overall, the ALJ and this Board Member find her testimony credible. Claimant testified that a majority of her work duties allowed her to sit at her desk, she was nevertheless required to post notices upon bulletin boards, walking around the plant and up and down stairs on hard surfaces wearing steel toed shoes. She testified this activity took her as little as 1-2 hours per week up to as much as 25 percent of her work week, if her co-worker was gone. In performing this task, she had at least one instance where she tripped on a pallet, although respondent denies that pallets could have been stationed in the area where claimant was working. In addition, at her break and at lunch time she was required to walk on concrete surfaces, going up and down the stairs.

The critical fact that respondent ignores in its analysis is the fact that claimant was compelled to wear steel toed shoes while working in this plant. And while no physician has testified that claimant's foot complaints were *caused* by her work activities, Dr. Prostic testified that her work activities *aggravated* that condition. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.[13] The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.[14] Dr. Bonar's supplemental report, provided

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[11] *Id.*

[12] K.S.A. 2007 Supp. 44-508(e).

[13] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984)*; Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[14] *Hanson v. Logan U.S.D. 326*, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

apparently after respondent informed her that claimant did very little walking, speaks only to the *cause* of claimant's foot complaints. She did not address the true issue here - whether her work activities aggravated her foot complaints.

Moreover, the fact that claimant was wearing steel toed shoes that are heavier than normal street shoes makes her work activities walking around the plant something other than an act of day-to-day living as that term is contemplated in K.S.A. 2007 Supp. 44-508(e).

In summary, this Board Member finds that claimant's date of accident for her series of repetitive injuries is May 27, 2008, and that she gave timely notice of her accident. Her present foot condition while not caused by her work activities was aggravated by them and she is entitled to the medical treatment outlined by Dr. Bonar.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Brad E. Avery dated November 25, 2008, is modified to reflect May 27, 2008 as claimant's date of accident, with all other findings and conclusions contained within the ALJ's Order affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of February 2009.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: Matthew R. Bergmann, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[15] K.S.A. 44-534a.